APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 20307

PAUL L. TEMPLE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(April 20, 1964.)

Before MARIS,* GEWIN, and BELL, Circuit Judges.

PER CURIAM: This appeal is from a judgment of conviction entered on a jury verdict of guilty under six counts of a fourteen count indictment charging use of the mails to defraud. 18 USCA. § 1341. The defense offered was based in the main on the contention of good faith in effecting a substantial business transaction involving the acquisition of control of an insurance company through

* Of the Third Circuit sitting by designation.

stock purchases from the majority stockholders with funds of the insurance company. The stock of the minority stockholders was not acquired; if indeed they even knew of the transaction. The *modus operandi* was the representation of a merger with another insurance company, and the letters forming the basis of the charge, *i.e.*, the mailing, were sent to the minority stockholders in connection with the purported merger. The promise of merger, although premised largely on hope, was not completely without substance. In the meantime the depletion of the treasury of the insurance company, to the substantial benefit of appellant, was discovered, and the transaction halted. Two business associates of appellant indicted along with him, were tried with him, and acquitted. All three were indicted as principals and also as aiding and abetting each other.

Appellant has retained new counsel for this appeal, and we are asked to invoke the plain error rule in several respects; no objection having been made to the admission of certain evidence or to the argument thereon, or to the jury charge in four particulars. Moreover, there was no objection to a ruling on the procedure to be followed by the lawyers for the defense, each defendant being represented by his or her own lawyer, with respect to their cross-examination of witnesses. See Rule 52(b), F.R.Crim. P., on the right of the courts to notice plain errors, and also *Sullivan* v. *United States*, 5 Cir., 1963, 317 F.2d 101; and *Rogers* v. *United States*, 5 Cir., 1962, 304 F.2d 520.

The evidence said to have been improperly admitted, other than the letters to stockholders which formed the basis of the use of the mails, went directly to the question of intent and it follows that it was admissible and that the argument thereon was not improper. *Cf. United States* v. *Crosby*, 2 Cir., 1961, 294 F.2d 928. With respect to the

letters which were mailed to stockholders in connection with the proposed merger, it is urged that they are legally insufficient on the theory that they were not mailed for the purpose of executing the scheme charged in the indictment. The evidence is more than ample to support the jury verdict resting on the inference to the contrary.

The charge has been carefully considered, and taken as a whole it was proper, adjusted to the evidence, and legally correct. The assignments of error based on the charge are without merit, over and above the fact that no objections were lodged to those portions of it now asserted as error. Rule 30, F.R.Crim.P.

The trial court suggested that the cross-examination in chief be conducted by one of the three lawyers for the defense, with the other two having the right to ask such special questions as might relate to his client. There was no objection to this procedure. All counsel seemed to have been well satisfied with it. It was a matter within the discretion of the court and there was clearly no abuse of that discretion. Thus it is that we do not reach any question of plain error for there is no error at all in any of these contentions.

The further contention that appellant was denied the assistance of counsel as afforded by the Sixth Amendment has also been considered. We are satisfied from a perusal of the record that appellant's trial counsel satisfied the requirement of that Amendment in full measure. *Popeko v. United States*, 5 Cir., 1961, 294 F.2d 168, cert. den., 374 U.S. 835, 83 S.Ct. 1883, 10 L.Ed.2d 1056.

The errors assigned being without merit, and it not otherwise appearing that appellant was deprived of a fair trial, the judgment of conviction should be, and it is

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20,307

PAUL L. TEMPLE,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING (May 28, 1964)
Before MARIS*, GEWIN, and BELL, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

* Of the Third Circuit sitting by designation.

APPENDIX "C"

CONSTITUTION, STATUTES AND RULES INVOLVED.

The Sixth Amendment to the Constitution of the United States, provided that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Title 18, United States Code, Section 1341, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

The Statutes of the State of Georgia involved in this case, are:

> "22.1843.1. *Merger of domestic with foreign corporations.*—Any corporation, except banks and trust companies, chartered under the laws of this State, may consolidate or merge with one or more other corpora-

tions organized under the laws of any other State or Country.

"If the merger or consolidation results in only one surviving corporation, and said corporation is to be a Georgia corporation, the laws of Georgia shall govern in all matters pertaining to mergers or consolidations of corporations, and the merger shall be accomplished according to the provisions of sections 22-1837 through 22-1843."

"22-1839. *Meeting of stockholders, vote on agreement.*—Said agreement (to Merger) shall be submitted to the stockholders of record of each corporation at a meeting thereof called separately for the purpose of voting upon said merger or consolidation, of which meeting notice of the time, place and object shall be given in accordance with the terms of the charter and bylaws of the said corporations to each stockholder of record, whether entitled to vote or not; and, at said meetings said agreement shall be considered and a vote by ballot in person or by proxy taken for the adoption or rejection of the same; and, if a majority of the votes of stockholders of each corporation holding stock in such corporations entitling them to exercise the voting power on the proposal to merge or consolidate said corporation with another or such other portions of the stockholders as may be prescribed by the charters or bylaws of said corporations, shall be for the adoption of said agreement, then that fact shall be certified by the secretary of each corporation or such other officer as has legal custody of the records of such corporations under the seals thereof and the agreement so adopted and certified shall be taken and deemed to be the agreement and act or merger or consolidation of the said corporations."

The Federal Rule of Criminal Procedure involved is Rule 33:

"A motion for a new trial * * * shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."